82-1341

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD T. WOOD,
Plaintiff-Respondent

v.

DIAMOND M DRILLING COMPANY, ET AL,
Defendants-Petitioners

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a seaman can recover maintenance after he voluntarily obtains other employment and, if so, whether any maintenance award should be offset by the earnings from such other employment and by the jury award for loss of past wages.

II. Whether a plaintiff can recover loss of future earnings where, at the time of trial, he is gainfully employed earning more money than he was at the time of his injury.

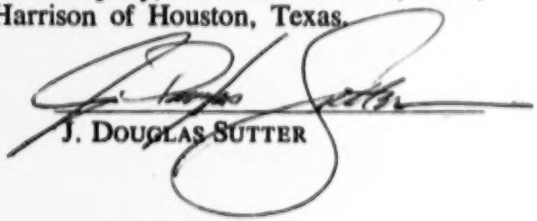
III. Whether a plaintiff can recover damages both for loss of life's enjoyment and for pain, suffering and mental anguish.

LIST OF PARTIES

The undersigned, counsel of record for Defendants-Petitioners Diamond M Drilling Company and Diamond M International Company, certifies that the following parties have an interest in the outcome of this case.

(1) Richard T. Wood, and his counsel, Mandell & Wright of Houston, Texas.

(2) Diamond M Drilling Company and Diamond M International Company, and their counsel, Ross, Griggs & Harrison of Houston, Texas.



J. DOUGLAS SUTTER

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DIAMOND M INTERNATIONAL COMPANY,
Defendants-Petitioners

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To The Honorable Justices of The Supreme Court
Of The United States of America:

Petitioners, Diamond M Drilling Company and Diamond M International Company, respectfully show:

OFFICIAL AND UNOFFICIAL REPORTS

The only report of this case of which Petitioners are aware is found in Volume 691, Federal Reporter, 2d Series, at Page 1165.

STATEMENT OF GROUNDS FOR JURISDICTION

This Petition is in appeal from a judgment entered on the 9th day of November, 1981, in the United States District Court for the Southern District of Texas, Houston Division, the Honorable George E. Cire presiding.

On appeal to the United States Court of Appeals for the Fifth Circuit, the judgment of the District Court was affirmed on the 22nd day of November, 1982. Petitioners filed a Petition for Rehearing, which was denied on the 16th day of December, 1982.

This Honorable Court has jurisdiction to consider this Petition pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case does not involve any statutes or regulations other than that conferring jurisdiction of this appeal, *supra*, and that conferring original jurisdiction upon the District Court below, 46 U.S.C. § 688, commonly known as the "Jones Act".

STATEMENT OF THE CASE

(1) Statement of Facts.

Plaintiff's claim arises out of an incident which occurred on the 5th day of July, 1978, in which Richard T. Wood sustained an injury to his left hand aboard the

semi-submersible drilling rig DIAMOND M NEW ERA off the coast of New Jersey.

On the occasion in question, Richard T. Wood was employed by Diamond M Drilling Company as a roughneck or floorhand. Mr. Wood was painting and doing general maintenance on the rig floor when he was called to the moon pool area of the rig. According to Mr. Wood, the fill-up line had become disengaged from the stack, and he and other men were sent to make repairs. Mr. Wood and a co-worker then erected a scaffold to conduct their work on the fill-up line. The job was done by four workers: the Plaintiff-Respondent, another roughneck, a welder and a derrickman. In order to help pass tools to the welder and his helper, Respondent positioned himself, in a sitting position, on the scaffolding about halfway between the bracket and the stack. Mr. Wood, without noticing, held onto what is known as a tensioner cable for balance. Tensioner cables come from large pulleys or sheaves underneath the rig floor and run to the respective corners of the rig, serving as an integral part of the system which keeps the stack upright in a rig in firm contact with the ocean floor. The tensioner cable moves in and out of the various pulleys as the rig rocks and sways with ocean swells. Mr. Wood grasped the cable at a point dangerously near one of the pulleys, and when the rig and cable moved with a swell of the ocean, the cable and the Respondent's left hand moved into the pulley mechanism, causing injuries mentioned hereinabove.

Mr. Wood was given emergency medical care at the rig infirmary and was taken by helicopter to a shoreside hospital shortly thereafter. He received extensive treatment, surgery and therapy from various physicians and medical institutions thereafter.

On or about September 11, 1979, Respondent voluntarily obtained employment with Sedco, Inc. as an administrative assistant in the financial department, earning $1,037.50 base pay every two weeks. Respondent stipulated that he was paid $250.00 per week by Diamond M from the date of his injury until at least the time of his employment with Sedco, Inc. During his convalescence, Mr. Wood stayed in New England with his parents, who provided him with food and lodging.

Regarding his plans for the future, Mr. Wood testified that he was pursuing, at the time of trial, a degree of Master of Business Administration while working at Sedco, Inc. He already held a Bachelor of Arts college degree. Mr. Wood testified that he is interested in becoming a teacher and pursuing a career as a business executive, goals which he has held for some time.

(2) Statement of Proceedings and Disposition in the Courts below.

This case was commenced by Richard T. Wood as Plaintiff against Diamond M Drilling Company as the original Defendant. Diamond M International Company, the owner of the DIAMOND M NEW ERA, was subsequently added as an additional party Defendant. The Plaintiff's action was filed under Rule 9(h), Federal Rules of Civil Procedure, and his claim is alleged to have been brought under the "Jones Act", 46 U.S.C. § 688 *et seq.*, and the general maritime law of the United States.

The issues of negligence, unseaworthiness, and damages were tried to a jury, and the issue of maintenance was submitted to the District Court by agreement.

In their answers to eight special interrogatories, the jury found that both parties were negligent, allocated 27% of the fault to Mr. Wood, found the DIAMOND M NEW ERA seaworthy, and found damages totalling $267,000.00. The District Court made separate findings of fact concerning maintenance. Defendants' post-verdict Motion to Disregard Jury Findings and for Judgment was filed on November 2, 1981, and was denied November 9, 1981, the same date that judgment was entered. Defendants filed their Motion for New Trial on November 16, 1981, which was denied on November 25, 1981.

Both parties timely filed Notices of Appeal, on December 8, 1981 and December 24, 1981, respectively. The case was submitted to the United States Court of Appeals for the Fifth Circuit upon written briefs. In a published opinion dated November 22, 1982, the Court of Appeals affirmed the lower court judgment. Defendants timely filed their Petition for Rehearing, which was denied on December 16, 1982.

Defendants-Petitioners now tender this their Petition for Writ of Certiorai to the United States Court of Appeals for the Fifth Circuit.

BASIS FOR ORIGINAL JURISDICTION IN THE DISTRICT COURT

Plaintiff's Complaint was filed as a suit for personal injury pursuant to Rule 9(h), Federal Rules of Civil Procedure, as a claim within the admiralty and maritime jurisdiction of the United States pursuant to 28 U.S.C. § 1333, 46 U.S.C. § 688 *et seq.*, and the general civil and maritime law.

ARGUMENT

POINT I

A SEAMAN CANNOT RECOVER MAINTENANCE AFTER HE VOLUNTARILY OBTAINS OTHER EMPLOYMENT AND, IN ANY EVENT, ANY MAINTENANCE AWARD SHOULD BE OFFSET BY THE EARNINGS FROM SUCH OTHER EMPLOYMENT AND BY THE JURY AWARD FOR LOSS OF PAST WAGES.

As has been noted in the Statement of Facts, Richard Wood voluntarily obtained employment with Sedco, Inc. on or about September 11, 1979. Approximately two weeks later, upon learning of Mr. Wood's other employment, Diamond M stopped making the $250.00 per week payments it had been making since the Respondent was injured. There is no testimony anywhere in the record, nor is there any contention, to the effect that Mr. Wood was forced to return to work out of economic necessity when he did. Therefore, an award of maintenance is not appropriate during this period, because the purposes of such payments have been served by Mr. Wood's other employment. Alternatively, Respondent's earnings with Sedco should be credited or offset against any maintenance which would otherwise be due from Petitioners, resulting in the maintenance obligation being entirely subsumed by the earnings from Respondent's other employment. This is an issue which has been passed upon by several district and appellate courts,[1] but not

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1. *Perez v. Suwanee S. S. Co.*, 239 F.2d 180, 181 (2nd Cir. 1956); *Wilson v. United States*, 229 F.2d 277, 280-81 (2nd Cir. 1955); *Rodgers v. United States Lines Co.*, 189 F.2d 226, 228 (4th Cir. 1951); *Inter Ocean S. S. Co. v. Behrendsen*, 128 F.2d 506, 508 (6th Cir. 1942); *Loverich v. Warner Co.*, 118 F.2d 690, 694 (3rd Cir. 1941); *Colon v. Trinidad Corp.*, 188 F.Supp. 97, 100 (S.D. N.Y. 1960); *Scott v. Lykes Bros. S. S. Co.*, 152 F.Supp. 104, 106 (E.D. La. 1957).

by this Court, and an issue which is of great significance to the maritime industry.

Maintenance is an allowance designed to cover the expenses a seaman incurs in acquiring food and lodging ashore during illness or disability. *Caulfield v. AC&D Marine, Inc.*, 633 F.2d 1129, 1131 (5th Cir. 1981). However, the duty of a shipowner to pay a seaman maintenance does not extend beyond the seaman's need. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528, 58 S.Ct. 651, 82 L.Ed. 993, 996 (1937). Thus, when a seaman is hospitalized without expense in a Marine hospital, he is not entitled to maintenance and cure for that period. *Calmar, supra*, 303 U.S. at 531. Nor must a shipowner pay maintenance to a seaman who convalesces at the home of his parents or wife without incurring expense or liability for his support. *Johnson v. United States*, 333 U.S. 46, 50, 68 S.Ct. 391, 92 L.Ed. 468, 472 (1948). Because the limited purpose of maintenance is to make the seaman whole, it logically follows that there should be no such duty for periods when the seaman, though perhaps not yet at the magical point of maximum medical benefit, either does in fact obtain equivalently gainful employment or is able to do so. Where a seaman's return to work is voluntary and not brought on by economic necessity, holding the seaman accountable for his earnings carries out the basic purpose of making the seaman whole and creates neither an undue incentive to the shipowner for withholding payments, nor pressure compelling a premature return to work. *Vaughan v. Atkinson*, 360 U.S. 527, 529, 82 S.Ct. 997, 8 L.Ed.2d 88, 96 (1962) (Stewart, J., dissenting). In *Vaughan*, this Court held that where a shipowner's callous and deliberate disregard of its main-

tenance obligation results in the seaman prematurely returning to work out of pure economic necessity, to keep food in his stomach and a roof over his head, the shipowner may not credit the seaman's earnings during this time against its maintenance obligation. The case at bar presents the opposite situation.

Because Respondent was employed for a significant period of time prior to trial, and because the purpose of maintenance has been fulfilled thereby, there should have been no duty on the part of the Petitioners to pay maintenance to Mr. Wood. A shipowner should not bear the burden the seaman has already been relieved of for whatever reason. *Gauthier v. Crosby Marine Service, Inc.*, 499 F.Supp. 295 (E.D. La. 1980).

This is not a case where the injured seaman has been forced to seek employment due to economic necessity resulting from the shipowner's failure to pay maintenance and cure. To allow such an award would only serve to encourage an injured seaman to remain idle while a denial of the award, under the facts of this case, visits no harm upon the Respondent, does not encourage the shipowner to withhold maintenance, and leaves the seaman whole. Therefore, Respondent is not entitled to an award of maintenance for the period from October 4, 1979 to July 1, 1981, during which he voluntarily obtained gainful employment.

The appellate court, in passing on this point, opined that Petitioners are construing *Vaughan* too narrowly, and held that:

> "Though . . . Wood is not entitled to a windfall, we do not believe that, under *Vaughan*, he should be subject to a forfeiture of his right under the law for having returned to work."

Yet if the maintenance award is allowed to stand, Respondent will have received money from *three* different sources prior to trial. First, there is the award for maintenance. Second, there is the sum of money Mr. Wood earned at Sedco. Third, there is the jury's award of $16,000 for loss of past wages. Petitioners submit that both Mr. Wood's Sedco earnings and the award of past lost wages should be offset against the maintenance award, if same is allowed to stand. This is in accordance with the rule that because lost wages are inherent in both an action for damages and a claim for maintenance, there must *not* be a duplication in the final award. *Blanchard v. Cheramie*, 485 F.2d 328, 330 (5th Cir. 1973); *Cates v. United States*, 451 F.2d 411, 417 (5th Cir. 1971); *Vickers v. Tunney*, 290 F.2d 426, 435 (5th Cir. 1961). Any maintenance which may have been due and owing to Respondent was subsumed by the jury's award of lost past and future wages and Mr. Wood's earnings at Sedco. The award of maintenance to Respondent was a duplication of the jury verdict and of the judgment thereon, in conflict with Fifth Circuit precedent. The Court of Appeals has, in affirming, ruled in violation of its own established rules of law.

POINT II

A PLAINTIFF MAY NOT RECOVER FOR LOSS OF FUTURE EARNINGS WHERE, AT THE TIME OF TRIAL, HE IS GAINFULLY EMPLOYED EARNING MORE MONEY THAN HE WAS EARNING AT THE TIME OF HIS INJURY.

The issue of Respondent's damages was submitted to the jury in the form of a single Special Interrogatory

which, together with the jury's answers, reads in pertinent part as follows:

> 8. From a preponderance of the evidence, what amount of money paid now in cash, if any, would fairly and reasonably compensate the Plaintiff, Richard T. Wood, for the injuries he has sustained?
>
> Answer in dollars and cents, if any, as follows:
>
> a. for wages lost up to the date of trial as a result of the injury;
>
> $16,000.00 (Sixteen Thousand)
>
> b. for the loss of future earnings caused by the injury;
>
> $200,000.00 (Two Hundred Thousand)
>
> * * *

The evidence to support any such award is extremely sketchy and speculative. As has been pointed out in the Statement of Facts, *supra*, Richard Wood became employed prior to trial, by Sedco, Inc., earning in excess of $24,000.00 per year, a sum greater than he was earning with Defendants-Petitioners. There was no evidence whatsoever that Respondent intended to remain a rig worker for the remainder of his life; to the contrary, his testimony showed his desire to make his way in the business world. Furthermore, although Mr. Wood testified concerning some difficulties he might have with performing heavy physical labor, his educational background and current employment are indicative of the fact that he suffers from no condition which limits his opportunity for gainful employment.

The proof necessary to support a recovery for loss of future earning capacity is well-established. The formula

to determine loss of future earning capacity and lost future wages is clearly set forth in *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970):

> "The claimant must first establish his normal annual earning capacity, *which in the absence of evidence of special circumstances indicating an ability to rise beyond his prior level of employment*, would consist of a projection of claimant's earnings history, taking into account *all available* data relevant to wage adjustment. . . . Next the claimant *must* establish the reduction, if any, in his earning capacity proximately resulting from the injury by showing the existence of some condition which demonstrably limits his opportunities for gainful activity."

436 F.2d at 1270. (Emphasis added). *See also, Wiles v. N.Y., C. & St. L. R.R. Co.*, 283 F.2d 328, 331 (3rd Cir. 1960); *Conte v. Flota Mercante del Estado*, 277 F.2d 664, 669 (2d Cir. 1960). Respondent clearly did not meet this test to show lost future earnings or lost future earning capacity, and the courts below have erred in not applying the relevant legal test to the evidence.

In *Kratzer v. Capital Marine Supply, Inc.*, 490 F. Supp. 222 (M.D. La. 1980), *aff'd*, 645 F.2d 477 (5th Cir. 1981), the district court made the following conclusion of law regarding loss of future earnings:

> "13. Kratzer is also entitled to past and future loss of earnings. * * * As of the trial date, he had lost $30,000.00 in past wages.
>
> Plaintiff anticipates that he will receive his college degree in 1982, and under these circumstances, he is entitled to future loss of wages for five years, *a period which will allow him to complete his edu-*

> *cation and establish himself in a new position paying as much or more than he was earning on the river.* * * *."

490 F. Supp. at 230. (Emphasis added). In this case, there was no evidence that it was Respondent's goal to remain a rig worker for the remainder of his life. Furthermore, Mr. Wood had already obtained his college degree and was well on his way toward a post-baccalaureate degree. He is *already* established in a position paying as much or more than he was earning as a rig worker.

In *Clements v. Chotin Transportation, Inc.*, 496 F. Supp. 163 (M.D. La. 1980), the plaintiff was employed as a head deckhand and tankerman when he sustained two separate injuries to his back, the second occurring on November 6, 1978. The District Court found that the plaintiff was enrolled in college and would get his degree in approximately two years. The Court concluded that the plaintiff was entitled to recover the wages he lost as a result of the second accident. Under the circumstances, the District Court awarded three months salary based on a twenty-four day per month cycle and thereafter lost daily wages on the basis of a thirty day on, fifteen day off scale until December of 1979. Finally, the Court concluded that the evidence presented on loss of future income after December of 1979 was *purely speculative,* and accordingly denied the plaintiff's claim for loss of future wages after that date. 496 F. Supp. at 168-69.

In its opinion in this case, the Fifth Circuit has departed from established precedent regarding recovery for loss of future earnings. The Fifth Circuit, in its opinion, treated this argument as one merely challenging the sufficiency of the evidence to support the jury's award. This

is, in fact, a point of law, concerning whether there can be an award for loss of future income in a situation where the claimant is earning more money after the accident than he was previously. Petitioners submit that in such a case, there can be no such award under the established tests for proving and recovery of loss of future earnings.

Petitioners submit that, because of the uncontradicted testimony regarding Respondent's current employment, he may not recover for loss of future earnings.

POINT III

A PLAINTIFF MAY NOT RECOVER BOTH FOR LOSS OF LIFE'S ENJOYMENT AND FOR HIS PAIN, SUFFERING AND MENTAL ANGUISH.

The damages issues, all embodied in Special Interrogatory No. 8, requested the jury to determine Plaintiff's past and future pain, suffering, and mental anguish[2] and also inquired about his loss of life's enjoyment in the past and in the future.[3] The jury awarded a total of $31,000.00 for past and future pain, suffering, and mental anguish, and separately awarded $20,000.00 for past and future loss of life's enjoyment.

The law is clear that loss of life's enjoyment is to be included in any award for pain, suffering and mental anguish, and as such is not to be considered as a separate element of damage. In *Dugas v. Kansas City Southern Rwy. Lines*, 473 F.2d 821, *reh. en banc denied*, 475 F.2d 1404 (5th Cir. 1973), the Court of Appeals held that:

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2. Special Interrogatory 8(c) and 8(d).

3. Special Interrogatory 8(e) and 8(f).

> ". . . the effect of injuries upon the normal pursuits and pleasudes of life is an included item, not a separate one, that is, the normal pursuits and pleasures of life are to be included as a part of pain, suffering, and inconvenience. It is not a factor to be separately measured as an independent ground for damages."

473 F.2d at 827. *Dugas* was a suit under the Federal Employers' Liability Act, and as such is applicable to this Jones Act action.

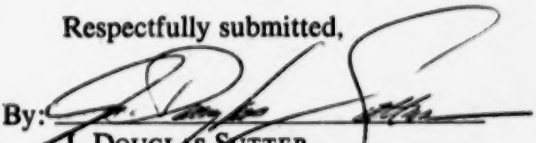
In light of the foregoing authority, the award for loss (past and future) of life's enjoyment is a duplication of the award for pain, suffering and mental anguish, and it was error to enter and affirm the judgment awarding both elements of damage.

The Court of Appeals in this case found no objection on the record to the simultaneous submission of these subissues, and therefore did not reach the merits of this Point. Petitioners submit that this argument was presented to the trial court in the form of various motions, and that the Court of Appeals erred in failing to consider this Point in accordance with the established rule of law.

CONCLUSION

For the reasons stated in Points I through III, Petitioners request that their Petition be granted, and that the holding of the Court of Appeals be reconsidered.

Respectfully submitted,

By: 

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APPENDIX "A"

Richard T. WOOD,
Plaintiff-Appellee Cross-Appellant,

v.

DIAMOND M DRILLING COMPANY
and Diamond M International Company,
Defendants-Appellants Cross-Appellees.

No. 81-2495

Summary Calendar.

UNITED STATES COURT OF APPEALS
Fifth Circuit

Nov. 22, 1982.

Roughneck seaman brought action under Jones Act for personal injuries sustained when tensioner cable the seaman had grasped moved and seaman's hand was pulled into pulley mechanism. The United States District Court for the Southern District of Texas, George E. Cire, J., entered judgment, and shipper apealed. The Court of Appeals, Brown, Circuit Judge, held that: (1) evidence was sufficient to support jury's award of $200,000 for loss of future earning sustained by roughneck; (2) roughneck's current employment paying salary in excess of that earned while employed as roughneck did not, by itself, render excessive jury's award of $200,000 for loss of future earnings; (3) evidence was sufficient to support jury's finding of $16,000 as wages roughneck lost as result of accident; (4) roughneck seaman's voluntarily obtaining

other employment did not preclude seaman from being entitled to maintenance until date on which seaman reached point of maximum medical benefit; and (5) evidence established that award to roughneck seaman of $30 per day maintenance was not excessive.

Affirmed.

Appeals from the United States District Court for the Southern District of Texas.

Before BROWN, REAVLEY and JOLLY, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This matter arises from a claim for personal injuries under the Jones Act, 46 U.S.C. § 688. Because we find evidence sufficient to support the jury's conclusions as well as the Court's findings regarding maintenance and cure, we affirm.

I. *Diamond and the Roughneck*

In exploring the many facets of this case, we begin with the DIAMOND M NEW ERA, a semi-submersible drilling rig owned by the defendant, Diamond M Drilling Company (Diamond).[1] Mounted in the sapphire seas off the coast of New Jersey, Diamond's ERA is but one of many such rigs found along the Atlantic's jewelled coast. In this simple yet impressive setting, the plaintiff, Richard Wood (Wood), was employed by Diamond as a roughneck or floor hand. On July 5, 1978, while doing general

1. Diamond M International Company was subsequently added as a party defendant.

maintenance work, Wood was called to the moon pool area of the rig to make some repairs on a disengaged fill-up line. To assist in these repairs, Wood positioned himself on some scaffolding and held on to a tensioner cable for balance. Tensioner cables secure the rig to the ocean floor. They move in and out of various pulleys as the rig rocks and sways in the ocean swells. At that moment, the cable that Wood was grasping moved because of an ocean swell and Wood's left hand was pulled into the pulley mechanism causing him serious injury.

Wood filed suit under the Jones Act, 46 U.S.C.A. § 688, and the Admiralty and General Maritime law of the United States alleging negligence and unseaworthiness seeking damages and maintenance.

The issues of negligence, unseaworthiness and damages were submitted to the jury on eight special interrogatories.[2] In answering the special interrogatories, the jury found both parties negligent, apportioning 27% fault to Wood, and found the DIAMOND M NEW ERA sea-

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2. F. R. Civ. P. 49(a). This court has long extolled the use of special interrogatories under Rule 49(a). *Trailways Bus System, Inc. v. J. C. Motor Lines,* 689 F.2d 599 (5th Cir. 1982); *Jones v. Miles,* 656 F.2d 103, 106 n. 3 (5th Cir. 1981); *Guidry v. Kem Manufacturing Co.,* 598 F.2d 402, 403, 405-06 (5th Cir. 1979); *Nardone v. Reynolds,* 538 F.2d 1131, 1137 n. 16 (5th Cir. 1976); *reh. denied,* 546 F.2d 906 (1977); *Jamison Co. v. Westvaco Corp.,* 526 F.2d 922, 934-35 (5th Cir.) *reh. denied,* 530 F.2d 34 (1976); *Kestenbaum v. Falstaff Brewing Corp.,* 514 F.2d 690, 693-94 (5th Cir. 1975), *cert. denied,* 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976); *Simmons v. King,* 478 F.2d 857, 862 n. 12 (5th Cir. 1973); *Burns v. Anchor-Wate Co.,* 469 F.2d 730, 734 n. 8 (5th Cir. 1972). *In re Double D Dredging Co.,* 467 F.2d 468, 469 (5th Cir. 1972); *Bailey v. Kawasaki-Kisen, K.K.,* 455 F.2d 392, 394 (5th Cir. 1972). *See generally* Brown, *Federal Special Verdicts: The Doubt Eliminator,* 44 F.R.D. 338 (1967).

worthy. It further awarded Wood $267,000 damages.[3]

The issue of maintenance and cure was submitted to the District Court by agreement. Following a conference on maintenance and cure, the court awarded Wood compensation maintenance of $30 per day from October 3, 1979 to July 1, 1981, the date on which Wood would reach his maximum medical recovery.

Following trial, Diamond filed a motion for j.n.o.v. The Court denied the motion and entered judgment. Diamond appeals.

II. *Diamond is for Error*

A. *Loss of Future Earnings*

Diamond argues that the jury's award of $200,000 for loss of future earnings was excessive and, for that reason, the Judge erred in entering judgment for this amount. Diamond contends that because Wood is now employed at a salary in excess of the amount he received

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3. The jury apportioned the award as follows:
   a. for wages lost up to the date of trial as a result of the injury:
      $16,000.00
   b. for the loss of future earnings caused by the injury:
      $200,000.00
   c. for any pain, suffering and mental anguish suffered in the past as a result of the injury:
      $18,500.00
   d. for any pain, suffering, and mental anguish which Plaintiff will probably suffer in the future as a result of the injury:
      $12,500.00
   e. for any loss of life's enjoyment suffered by the Plaintiff in the past as a result of the injury:
      $10,000.00
   f. for any loss of life's enjoyment which Plaintiff will probably suffer in the future as a result of the injury:
      $10,000.00

while employed at Diamond and had not intended to remain a rig worker for the rest of his life, a jury award of $200,000 was unsupported by the evidence and, in any case, excessive. Diamond's argument is flawed.

[1] This Court affords great deference to jury findings. The Seventh Amendment to the Constitution provides that no fact tried by a jury shall be reexamined by any court of the United States except according to the rules of common law. This constitutional requirement is reinforced by statute in cases brought under the Jones Act. *Boeing v. Shipman*, 411 F.2d 365, 371 (5th Cir. 1969). For that reason, an appellate court may not reweigh the evidence or set aside the jury's verdict merely because the appellate judges could have drawn different inferences or conclusions from the evidence, or feel that other results might be more reasonable. *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963); *Sentilles v. Inter-Carribean Shipping Corp.*, 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142 (1959). The most an appellate court can do is to determine whether there was any competent and substantial evidence in the record which fairly tends to support the verdict. *Mortensen v. United States*, 322 U.S. 369, 64 S.Ct. 1037. 88 L.Ed. 1331 (1944). Thus, an appellate court will not overturn a jury's verdict, even though contradictory evidence was presented, if there is an evidentiary basis for the verdict. *Basham v. Pennsylvania Railroad Co.*, 372 U.S. 699, 83 S.Ct. 965, 10 L.Ed.2d 80 (1963); *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946).

[2] Measured by these standards, we hold that there is sufficient evidence in the record to support the jury's

award of $200,000 for loss of future earnings. Wood testified that he planned to remain in the oil drilling field and that being an assistant driller was the kind of work he wanted to do. Wood's wife testified that her husband wanted a kind of job where he could work with people and where he could be physically active. A court of appeals can review the findings of a trial court, but it cannot try the action *de novo*. Thus, this Court cannot weigh the evidence or reassess testimony, since the trier of fact is the ultimate judge of the credibility of the witnesses. *Friedman v. Commissioner*, 235 F.2d 86 (6th Cir. 1956). Thus, though the proof many not be D-flawless, the evidence in the record is sufficient to sustain a jury award of $200,000 for loss of future earnings.

[3] Moreover, we do not find the amount of the award excessive. We have repeatedly held that a jury's award is not to be disturbed unless it is so large as to "shock the judicial conscience", indicate "bias, passion, prejudice, corruption, or other improper motive" on the part of the jury, *Allen v. Seacoast Products, Inc.*, 623 F.2d 355, 364 (5th Cir. 1980), or is "contrary to all reason." *Menard v. Penrod Drilling Co.*, 538 F.2d 1084 (5th Cir. 1976). *See* e.g., *Morgan v. Commercial Union Assurance Cos.*, 606 F.2d 554, 556 (5th Cir. 1979); *King v. Ford Motor Co.*, 597 F.2d 436, 445 (5th Cir. 1979); *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835, 90 S.Ct. 93, 24 L.Ed.2d 85 (1969). Thus, before a court of appeals may set aside an award of damages as being excessive, it must make a detailed appraisal of the evidence bearing on damages and find that, in light of such detailed evidence, the amount of the jury award is so high that it would be a denial of justice to permit it to stand. *Grunen-*

thal v. Long Island Railroad Co., 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed.2d 309 (1968); and *see Gorsalitz v. Olin Matheson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970).

[4] Wood presented detailed evidence as to his projected lifetime earnings. In its brief, Diamond does not challenge these projections outright, but rather focuses on Wood's current employment with Sedco and the fact that Wood is currently earning a salary in excess of that he earned while employed by Diamond. In *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 452 F. Supp. 841, 846 (W.D. Pa. 1978) the Court based its award for loss of future earnings on loss of employment opportunities as opposed to actual reduction in earnings. The Court said, "it is not the status of the immediate present which determines capacity for remunerative employment. Where permanent injury is involved, the whole span of life must be considered. It must be determined whether or not the economic horizon of the plaintiff has been shortened because of the injury sustained as a result of defendants' negligence." *Id.* at 846. Though not bound by the decision, we nevertheless agree with the Court's analysis. We are not shocked, or dazzled, by what Diamond would have us believe is a forty-carat award. We therefore hold that the District Court was correct in entering judgment on the jury's finding.

B. *Lost Wages*

[5] Diamond next argues that the jury's finding of $16,000 in lost wages was incorrect. Diamond argues that since Wood's base salary was paid by Diamond until the time of his voluntary employment with Sedco, the evidence

was insufficient to support the jury's award. We do not agree.

At first glance, Diamond's argument has a ring of truth. Prior to his employment with Sedco, Wood did receive $250 per week in payments from Diamond. Though this amount roughly equals Wood's weekly salary from Diamond,[4] Diamond's suggestion that Wood had already been paid his lost wages is flawed.

This cutty analysis of Diamond's claim reflects this Court's hesitance to overturn jury findings. As suggested above, this Court will disturb jury findings only when they "shock the judicial conscience." The $16,000 award for lost wages is clearly reflected in the evidence. Wood presented detailed evidence concerning both his salary at the time of the accident and his potential earning increases to the date of trial. Yet even if Wood had remained at his salary level as of the date of the accident, the $16,000 award for lost wages would not be so outrageous as to justify this Court's overturning it. In fact, counsel for Diamond, who clearly has no need to magnify the award, in his closing argument to the jury, suggested that lost wages, if any, should be "somewhere in the neighborhood of $12,000". On this basis, we see no reason to disturb the jury's findings.

C. *Loss of Life's Enjoyment*

[6] Diamond next urges that the trial court erred in entering judgment for plaintiff's loss of life's enjoyment

4. Wood urges, and Diamond, in its reply brief, admits that these payments were characterized by the District Court as maintenance. Reply Brief at 5. *See* slip op. p. 720, p. _____, *infra*, where this Court affirms the District Court's finding of $30 per week maintenance.

in addition to his pain, suffering, and mental anguish. *See* note 3, (c) and (d). The issue of loss of life's enjoyment suffered by Wood was submitted to the jury on special interrogatories. *See* note 3, (e) and (f). This Court has traditionally held that a trial judge has considerable discretion in framing the issues involved. *Dreiling v. General Electric Co.*, 511 F.2d 768, 774 (5th Cir. 1975); *Abernathy v. Southern Pacific Co.*, 426 F.2d 512, 514 (5th Cir. 1970); *Grey v. First National Bank of Dallas*, 393 F.2d 371, 385 (5th Cir.), *cert. denied*, 393 U.S. 961, 89 S.Ct. 398, 21 L.Ed.2d 374 (1968). Although the judge must frame the special issues submitted to the jury, he is entitled to the assistance of counsel for both parties. On the record before this Court, we find no objection made by Diamond's counsel to the separate and simultaneous submission of the issues of loss of life's enjoyment and damages for pain, suffering, and mental anguish. By failing to object, defendant denied the Court below an opportunity more precisely to frame the issues involved. For that reason, we have consistently held that a party who fails to object to the form of special interrogatories and accompanying general instructions cannot complain for the first time on appeal. *J. C. Motor Lines*, at 602; *Charles Stores, Inc. v. Aetna Insurance Co.*, 490 F.2d 64, 67-68 (5th Cir. 1974); *Nimnicht v. Dick Evans, Inc.*, 477 F.2d 133, 134 (5th Cir. 1973). Because Diamond failed to object, we need not reach the merits of its claimed duplication of award.[5]

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5. Had a timely, adequate objection to the Judge's charge and the interrogatories been made, the result here might have been different. *Crador v. Louisiana Department of Highways*, 625 F.2d 1227 (5th Cir. 1980); *Dugas v. Kansas City Southern Railway Lines*, 473 F.2d 821, *reh. denied* 475 F.2d 1404 (5th Cir. 1973).

D. *Maintenance*

[7] Diamond's fourth basis for appeal concerns the District Court's award of maintenance of $30 per day up to the date on which Wood reached the point of maximum medical benefit. Diamond contends first that awarding maintenance from the date plaintiff voluntarily obtained other employment with Sedco to the date he reached the point of maximum medical benefit constitutes double recovery. In so arguing, Diamond appears to confuse the policies underlying the duty to provide maintenance and cure with those forming the basis for other compensatory rights. In *Calmar S.S. Corp. v. Taylor,* 303 U.S. 525, 58 S.Ct. 651, 82 L.Ed. 993 (1938), the Supreme Court catalogued the policy rationales underlying the rule by referring to Mr. Justice Story's opinion in *Harden v. Gordon,* 11 Fed. Cas. No. 6047 (C.C.).

[8] Admiralty courts have been liberal in interpreting this duty. *Id.* 303 U.S. at 529, 58 S.Ct. at 653. In *Aguilar v. Standard Oil Co.,* 318 U.S. 724, 730, 63 S.Ct. 930, 87 L.Ed. 1107 (1943), the Supreme Court held a shipowner's liability for maintenance and cure to be among the "most pervasive" of all and that it was not to be defeated by restrictive distinctions nor was it to be "narrowly confined." *Id.* at 735, 63 S.Ct. at 936. Moreover, when there are ambiguities or doubts concerning a shipowner's liability, they are to be resolved in favor of the seaman. *Warren v. United States,* 340 U.S. 523, 71 S.Ct. 432, 95 L.Ed. 503 (1951).

For these reasons, maintenance and cure differs from contractual rights. The Court, in *Cortes v. Baltimore Insular Line,* 287 U.S. 367, 371, 53 S.Ct. 173, 77 L.Ed. 368 (1932), held that maintenance and cure "is imposed

by the law itself as one annex to the employment. . . . Contractual it is a sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident." Thus, recovery of maintenance and cure is not subject to the same mitigation limitations that goven recovery based on ordinary contractual rights.

In *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962) the Supreme Court allowed recovery of maintenance and cure without deduction of the amount of plaintiff's earnings subsequent to his injury. The Fifth Circuit has spoken more directly to this issue in *Brown v. Aggie & Millie, Inc.*, 485 F.2d 1293, 1296 (5th Cir. 1973). In *Brown*, this Court held that the cut-off point for maintenance and cure is not the time at which the seaman recovers sufficiently to return to his old job but rather is the time of maximum possible cure. *See Farrell v. United States*, 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949); *Lirette v. K & B Boat Rentals, Inc.*, 579 F.2d 968 (5th Cir. 1978); *Price v. Mozer*, 483 F.2d 275 (5th Cir. 1973); *Myles v. Quinn Menhaden Fisheries, Inc.*, 302 F.2d 146 (5th Cir. 1962); *Reardon v. California Tanker Co.*, 260 F.2d 369 (2d Cir. 1958), *cert. denied*, 359 U.S. 926, 79 S.Ct. 609, 3 L.Ed.2d 628 (1959).

Diamond relies on *Vaughan* for the proposition that *only* when a seaman's return to work was brought about by economic necessity resulting from the shipowner's failure to pay maintenance and cure is he entitled to maintenance and cure during the period of employment. Thus, it argues that because Wood's employment is not the result of such economic necessity, he is no longer entitled

to maintenance and cure. We see no reason to read *Vaughan* so narrowly.

Though there is some indication in the available record that Wood recuperated at his parent's house for the first few months following his injury, the record is otherwise devoid of Wood's economic reasons for obtaining employment with Sedco. Though we agree with Diamond that, under *Johnson v. United States,* 333 U.S. 46, 68 S.Ct. 391, 92 L.Ed. 468 (1948), Wood is not entitled to a windfall, we do not believe that, under *Vaughan,* he should be subject to a forfeiture of his right under the law for having returned to work. Thus, in accordance with our decisions in *Brown* and *Lirette,* we hold that the District Court did not err in awarding maintenance to Wood to the date he reached the point of maximum medical benefit.[6]

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6. *Pyles v. American Trading & Production Corp.,* 372 F.2d 611 (5th Cir. 1967) is not inapposite. In *Pyles,* an injured seaman, who was receiving payments from American as the result of an employment-related back injury, went to work for another ship, was reinjured and received maintenance from the second ship. The Court held that he was not entitled to collect a second time maintenance he had already received in voluntary payments by another shipowner.

The Court acknowledged, *Id.* at 616, that the rule of *Vaughan* and *Yates v. Dann,* 223 F.2d 64 (3d Cir. 1955), applied and that the fact that the plaintiff had returned to work did not bar his recovery of maintenance. 223 F.2d 64. It was of the opinion that the facts in *Pyles* were "radically different" from those in *Vaughan* and *Yates* and, on that basis, limited recovery.

In *Pyles,* the plaintiff sought to receive maintenance from *two* separate sources on the basis of a reinjury incurred while performing that same type of task that resulted in the original injury. Thus, he sought to enhance his recovery from American because of his activities and reinjury on another ship. Pyles had been certified Fit for Duty prior to his reinjury.

Here, Wood had not returned to his "accustomed trade", 372 F.2d at 619, but had instead taken a clerical job as an administrative assistant in Sedco's financial department. Unlike Pyles, Wood had never been certified Fit for Duty, had not been reinjured, and was

[9, 10] In the alternative, Diamond argues that any award of past lost wages, if upheld, duplicates the award of maintenance and cure and should be offset against it. In *Cates v. United States*, 451 F.2d 411, 417-18 n. 20 (5th Cir. 1971), we held that unless there is an "affirmative showing on the record" that the elements compensated for (here lost wages) have actually been included in the maintenance award, a seaman is not precluded from recovering maintenance. Moreover, the burden is on the one claiming duplication to show that the damages assessed against it have "in fact and in actuality" been previously covered. *Id. See Billiot v. Sewart Seacraft*, 382 F.2d 662 (5th Cir. 1967); *Vickers v. Tumey*, 290 F.2d 426 (5th Cir. 1961); *Smith v. Lykes Brothers-Ripley*, 105 F.2d 604 (5th Cir.), *cert. denied*, 308 U.S. 604, 60 S.Ct. 141, 84 L.Ed. 505 (1939); *Muise v. Abbott*, 60 F.Supp. 561 (D. Mass. 1945), *aff'd*, 160 F.2d 590 (1st Cir. 1947). No such showing was made. Furthermore, we find no interrogatory, objection to the charge, or argument to the jury that suggests duplication. Absent this, we hold that the award for maintenance and cure is not duplicated by the award for lost wages.

[11] Diamond polishes off its appeal by arguing that the District Court's award of $30 per day maintenance was excessive. It cites numerous cases in support of its assertion that no reported decision awards maintenance greater than $20 per day. Of course, what is a reasonable cost of care during essential convalescence is, quite ob-

---

not receiving maintenance from another ship. In fact, Wood had never recovered from his injuries. *After* he began working for Sedco in September of 1979, Wood underwent three operations on his hand and extensive therapy. With these uncontradicted facts *Pyles* is not controlling.

viously a fact question. Just as obviously, findings of fact by the District Court are binding unless clearly erroneous. F. R. Civ. P. 52(a); *Webb v. Dresser Industries,* 536 F.2d 603, 606 (5th Cir. 1976), *cert. denied,* 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.2d 572 (1977). There is testimony in the record to support the $30 per day award. *See Morel v. Sabine Towing & Transportation Co.,* 669 F.2d 345, 347 (5th Cir. 1982) (plaintiff's testimony on maintenance and cure sufficient to sustain award). Measured by this standard, we hold that the District Court's finding of $30 per day maintenance was not clearly erroneous. Though there may have been evidence to the contrary, viewing the record as a whole, we see no reason to disturb the District Court's award. *See Vaughan,* 369 U.S. at 532, 82 S.Ct. at 1000 (ambiguities and doubts are to be resolved in favor of the seaman).

For the foregoing reasons, the District Court's decision was of gem quality and judgment below was correct.[7]

AFFIRMED.

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7. This Court having affirmed the judgment below, there is no need to rule on Wood's cross-appeal concerning trial by jury in admiralty actions. Wood's motion for sanctions under F. R. Civ. P. 38 is denied.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2495

RICHARD T. WOOD,
Plaintiff-Appellee Cross-Appellant,

versus

DIAMOND M DRILLING COMPANY and
DIAMOND M. INTERNATIONAL COMPANY,
Defendants-Appellants Cross-Appellees.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING

(December 16, 1982)

Before BROWN, REAVLEY and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ JOHN R. BROWN
United States Circuit Judge
12-14-82

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-80-1500

RICHARD T. WOOD

v.

DIAMOND M DRILLING COMPANY, ET AL

(Filed November 9, 1981)

JUDGMENT

On October 9, 1981, a jury in this cause rendered judgment for Plaintiff in the amount of $267,000.00 and found Plaintiff 27% contributorily negligent.

On the issue of maintenance which the parties agreed to submit to the Court, the following findings of fact are made by this Court:

1. Plaintiff reached maximum medical recovery on July 1, 1981.

2. The maintenance rate is awarded at $30.00 per day.

3. Plaintiff is not entitled to recover maintenance while hospitalized at Defendant's expense.

It is, therefore, ORDERED, ADJUDGED and DECREED that Plaintiff recover from Defendants $194,910.00 based upon the jury's award and the sum of $16,000.00 for maintenance.

Post-judgment interest is awarded at 9% per annum.

Signed and Entered this 9th day of November, 1981 at Houston, Texas.

/s/ GEORGE E. CIRE
United States District Judge

APPROVED AS TO FORM ONLY:

/s/ SIDNEY RAVKIND
Sidney Ravkind
Attorney for Plaintiff,
Richard T. Wood

/s/ J. DOUGLAS SUTTER
J. Douglas Sutter
Attorney for Defendants,
Diamond M Drilling Company and
Diamond M International Company

NO. 82-1341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD T. WOOD,
Plaintiff-Respondent

v.

DIAMOND M DRILLING COMPANY, ET AL,
Defendants-Petitioners

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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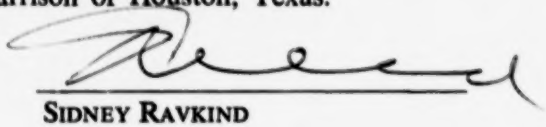
Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

LIST OF PARTIES

The undersigned, counsel of record for Plaintiff-Respondent Richard T. Wood certifies that the following parties have an interest in the outcome of this case.

(1) Richard T. Wood, and his counsel, Mandell & Wright of Houston, Texas.

(2) Diamond M Drilling Company and Diamond M International Company, and their counsel, Ross Griggs & Harrison of Houston, Texas.



SIDNEY RAVKIND

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COUNTERPOINTS AND ARGUMENT

I.

Counterpoint: There has been no triple recovery. Because Defendant Diamond has so grossly misrepresented

the quality of its jewelry, we believe a brief response is necessary. The weekly payment by defendant of $250.00 was offset against the total maintenance award. (Tr. Vol. II, p. 265). The amount of earnings while under medical care was offset in determining lost wages prior to trial. Plaintiff was off work one year and three months. The jury found lost wages prior to trial to be $16,000. Had the jury not considered those earnings, the amount would have been approximately $65,000.00. As pointed out by Judge Brown, the defendant argued for an award of $12,000.00 for past lost wages.

Thus the defendant has received credit for all its payments and the plaintiff's earnings. It would be manifestly unjust to deduct those earnings twice.

II.

Counterpoint: Future wage loss is amply shown. The Court of Appeals answers this issue.

III.

Counterpoint: Any error on submission of the issues was waived. As the Court of Appeals pointed out, defendant did not object to the issues submitted. Defendant's suggestion that it raised the issue in "various motions" is without merit.

CONCLUSION

We pray that the writ of certiorari be denied.

Respectfully submitted,

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Houston, Texas 77002
713/228-1521

Attorney for Plaintiff-Respondent, Richard T. Wood

CERTIFICATE OF SERVICE

This is to certify that on the 7 day of March, 1983, a true and correct copy of the foregoing instrument was served by United States mail on Mr. J. Douglas Sutter, Ross, Griggs & Harrison, 2600 Two Allen Center, Houston, Texas 77002, Attorney for Defendants-Petitioners, Diamond M Drilling Company, et al.

SIDNEY RAVKIND